No. 86-473

In the Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, AND AMERICAN PAPER INSTITUTE IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST

With written consent of the parties,[1] the Chamber of Commerce of the United States, American Petroleum Institute, Chemical Manufacturers Association, Synthetic

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[1] The consent letters have been filed with the Clerk of this Court.

Organic Chemical Manufacturers Association, and American Paper Institute respectfully submit the attached brief *amicus curiae* pursuant to Supreme Court Rule 36.2. *Amici curiae* are five major trade associations which represent a broad cross-section of American industry regulated under the Clean Water Act ("Act"), 33 U.S.C. §§ 1251-1376 (1982). *Amici* regularly represent their members' views in court on issues of national significance.

Amicus Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Its membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. The Chamber's membership reflects the diversity of American industry and includes companies of all sizes and types.

Amicus American Petroleum Institute ("API") is a national trade association with a membership of over 200 corporations and 6,000 individuals who are engaged in all aspects of the petroleum industry, including exploration, production, refining and marketing.

Amicus Chemical Manufacturers Association ("CMA") is a non-profit trade association whose members produce more than ninety percent of this country's basic industrial chemicals.

Amicus Synthetic Organic Chemical Manufacturers Association ("SOCMA") is a non-profit trade association with more than 140 members, including many small companies. SOCMA's members produce a wide variety of organic chemicals, many of which are used as intermediates in the production of plastics and fibers, coatings, dyes, flavorings, pharmaceuticals and other products.

Amicus American Paper Institute ("API") is a national trade association of the pulp, paper and paper-

board manufacturing industry. The 175 member companies of API provide about ninety percent of all pulp, paper and paperboard manufactured in the United States.

The question before the Court in this case is whether Section 505 of the Clean Water Act, 33 U.S.C. § 1365, empowers citizens to sue companies that are in compliance with, but which had in the past violated, that Act. This question of statutory construction goes to the heart of how Congress intended the Clean Water Act to be enforced, and raises legal and practical issues of vital concern to each of the *amici* and to the regulated community in general.

The trade association *amici* are committed to the goals of the Clean Water Act and compliance with its requirements. They do not believe, however, that Congress ever intended citizen suits to be coextensive with the full panoply of enforcement powers which repose in governmental authorities. *Amici* are concerned, therefore, that the Fourth Circuit's construction of the statute has elevated the role of citizen suits well beyond what Congress intended when it enacted Section 505 of the Clean Water Act.

STATEMENT OF THE CASE

Section 505 allows citizens to commence civil actions against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this Act." 33 U.S.C. § 1365(a)(1)(A). In the case below, the United States Court of Appeals for the Fourth Circuit held the operative words—"in violation of"—to include purely past violations that had ceased prior to commencement of the suit. *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986). In so doing, the Fourth Circuit rejected the Fifth Circuit's decision in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), which construed the plain meaning of the words "in violation"

to mean that citizen suits can be initiated only to enforce the Act against a discharger whose violations are ongoing.

The Fourth Circuit's decision below raises important national issues concerning the scope of citizen suit enforcement under Section 505 of the Clean Water Act. Resolution of these issues requires an appreciation of how effluent limitations are established and enforced under the Clean Water Act.

A. Establishment Of NPDES Permit Limitations

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, prohibits the discharge of pollutants to navigable waters except in compliance with a permit issued by the Environmental Protection Agency ("EPA") or an approved state under Section 402 of the Act, 33 U.S.C. § 1342. These permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, contain specific limitations on the mass or concentration of pollutants that may be discharged.

Limits contained in NPDES permits are derived in two ways. They may be calculated from technology-based effluent limitations guidelines promulgated by EPA under Section 304 of the Act, 33 U.S.C. § 1314. Or, where guidelines have not been promulgated, permit limitations may be based upon the "best professional judgment" of permit writers as to the technologically achievable level of water pollution control.[2]

The promulgation of effluent limitations guidelines has been far more difficult than anyone, including Congress, expected. Congress required EPA to issue technology-based guidelines within one year of the adoption in 1972 of the Federal Water Pollution Control Act Amendments.

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[2] 33 U.S.C. § 1342(a)(1). NPDES permits may also contain water-quality based limits derived from state water quality standards. 33 U.S.C. § 1313.

33 U.S.C. § 1314(b). Since 1972, EPA has devoted significant effort to the development of effluent limitations guidelines but has been unable to complete that task,[3] for a number of reasons.

First, American industry is extraordinarily diverse and complex. Plants that produce the same product may use different raw materials or different processes. To comply with Section 304 of the Act, EPA must identify categories of industry that can reasonably be subjected to the same discharge limitations. Even then, EPA has found it necessary to divide plants into subcategories because of differences in the wastewater generated by different plants in a particular industry.

Second, when Congress adopted technology-based requirements in 1972, very little was known about the capability of various treatment technologies to treat the different types of wastewaters generated by industrial plants. Numerous treatment technologies were only in the planning or development stages; other were still only theoretical. Thus, the task of establishing precise, numerical effluent limitations that reliably can be achieved by the installation of wastewater treatment technology was—and remains—as much an art as a science.

To derive guidelines for a particular industry, EPA selects a "model" treatment technology, and then applies a statistical calculation to identify the level of pollution control achievable 95-99% of the time.[4] The guidelines do not represent a level of control achievable 100% of the time, even using the technology on which EPA relied.

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[3] *See Natural Resources Defense Council, Inc.* v. *Train*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976). *See also Natural Resources Defense Council, Inc.* v. *EPA*, 510 F.2d 692 (D.C. Cir. 1975).

[4] *See Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1272-73 (9th Cir. 1977); *FMC Corp.* v. *Train*, 539 F.2d 973, 985 (4th Cir. 1976).

Once EPA establishes effluent limitations guidelines, translating them into enforceable permit limits is also a difficult task. Again, the complexity and variety of American industry, and the still developing science of wastewater treatment mean that the process is often an imprecise one.

When guidelines apply, a plant may not fit neatly into one subcategory, or even one category.[5] Complex manufacturing facilities often engage in operations that fall under more than one set of effluent limitations guidelines. For example, a plant may engage in the manufacture of both organic and inorganic chemicals, which are subject to different EPA guidelines, or a plant may engage in two processes that fall under different subcategories within a single guideline.

Where there are no applicable EPA guidelines, or there are guidelines for only part of a plant's operations, permit limitations must be established case-by-case. In these circumstances, a permit writer's professional judgment must be exercised to derive a set of limitations applicable to the wastestreams. The vast majority of NPDES permits contain limitations calculated on this basis. These "best professional judgment" permit limits are essentially educated guesses—both as to the levels of pollutant reduction that can be achieved after new treatment technology is installed and as to the date by which compliance with the limits can be achieved.

B. Achievement Of Permit Limitations

It is not surprising that permit limits often cannot be met or cannot be met within the time frame contem-

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[5] A discharger that is fundamentally different from the other plants in a category that were used to develop the limitations for the industry may apply for a "fundamentally different factors" variance, but they are rarely granted. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

plated by the permit writer. A plant may install the technology on which the permit limits were based, but it still may be unable to meet the limits. In theory, the plant could seek a modification of its permit. However, permit-issuing authorities have been unable to keep up with the formidable task of issuing new and renewed permits, and there is a tremendous backlog of expired permits; timely permit modifications are seldom possible.

Plants seek to come into compliance with their permit limits in a number of ways. They seek to upgrade or fine tune their wastewater treatment systems, in an effort that can be time-consuming and costly. Steps may include pilot plant or laboratory studies and may result in use of different chemicals for treatment, revised timing of certain treatment steps, process modifications, or installation of additional treatment technology.

By this trial-and-error process, plants seek to come into compliance. It may take weeks, months, or several years before the right combination of steps is identified and implemented and compliance with permit limitations is achieved consistently. During this time, dischargers are often in regular contact with the permit-issuing authorities, *i.e.*, EPA or a state agency, advising them of actions the plant is taking. If these authorities believe that action is not being undertaken expeditiously or that enforcement is otherwise necessary, they may bring appropriate enforcement actions in state or federal court. If the permitting authority concludes that a company is taking appropriate steps to achieve compliance under the circumstances, it may exercise enforcement discretion not to bring suit.

C. Enforcement Of Permit Limitations

In addition to discharge limitations, NPDES permits contain conditions that require dischargers to monitor their effluent and to report the results to EPA or the state. Dischargers are required to sample for—and to

comply with limitations on—pollutants on either a daily, weekly or monthly basis. These samples are analyzed in accordance with EPA-approved analytical methods. The results of a discharger's analyses are reported to the permit-issuing authority on a regular basis in Discharge Monitoring Reports.

The discharger's self-reporting of permit exceedences is often sufficient to establish liability in enforcement actions.[6] It should be recalled, however, that permit limitations are *not* designed to be achievable 100% of the time, even under ideal conditions. As EPA has observed, "occasional, infrequent instances of noncompliance are statistically predictable at well-operated and maintained treatment facilities."[7] In recognition of this, EPA and state enforcement officials may exercise discretion on whether to bring an enforcement action (*e.g.*, where treatment is exemplary but statistically-expected violations occur). This necessary discretion is lost when citizen groups institute suits.

SUMMARY OF ARGUMENT

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, should be construed in a manner that recognizes Congress' overriding concerns regarding the role of citizen participation in enforcement as well as the technical uncertainty inherent in setting permit limitations. Citizen

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[6] EPA's regulations identify two instances when exceedence of a permit limitation would not constitute a violation: instances of operational "upset," and "bypass" of the treatment system in certain circumstances. 40 C.F.R. §§ 122.41(m), (n). Other defenses might also be available in a particular case.

[7] EPA Document 440/1-83-007B, *Development Document for Proposed Effluent Limitations Guidelines and Standards for the Inorganic Chemical Point Source Category (Phase II)* (Oct. 1983), at 113. As EPA further explained: "Such high variations may be due to a variety of factors, such as short-term maladjustments in treatment facilities, variations in flow or pollutant load, or changes in the influent stream . . . ." *Id.*

participation is not an end unto itself; rather, in appropriate circumstances, it is a useful supplemental means to the end of preserving and enhancing the integrity of the nation's waters.

The citizen suit provision is designed to provide an additional means of compelling compliance with the requirements of the Clean Water Act. It provides a cause of action for citizen plaintiffs, and jurisdiction in the court, to abate ongoing violations by means of injunctive relief. The citizen suit provision is analogous to EPA's authority to issue compliance orders or to seek injunctive relief against a discharger who is "in violation."

The citizen suit provision is not intended as a mechanism for penalizing purely past violations. The imposition of penalties in a citizen suit is ancillary, and penalties are available in conjunction with injunctive relief only as "appropriate."

The government's ability to seek penalties is not so constrained, but the government exercises prosecutorial discretion, taking into account good faith remedial efforts and the fact that some exceedences are expected given the way permit limitations are established. Permit limitations are not established at levels achievable 100% of the time, and control technology often does not perform at 100% efficiency. Implementation of the Clean Water Act requires a certain amount of "give and take" between the regulators and the regulated community and may call for exercise of prosecutorial discretion by permit authorities where, notwithstanding installation of the requisite technology and model operation of the system, occasional exceedences of permit limitations inevitably occur. Allowing citizens to seek penalties for purely past violations which have since been remedied would not serve any abatement purpose and would discourage rather than encourage achievement of the goals of the Clean Water Act.

For just such reasons, Congress carefully circumscribed the availability of citizen suits. A citizen suit will lie

only where the discharger is "in violation" and then only "to enforce" the limitations of the permit. As the First Circuit concluded, "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violation justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1093 (1st Cir. 1986). Such a "construction corresponds both with the statutory language and with the statutory purpose." *Id.* at 1094. It also harmonizes the Congressional purpose of authorizing citizen suits as a supplemental means of enforcing compliance with the practical realities of pollution control and the permitting system.

ARGUMENT

I. CITIZEN SUITS UNDER THE CLEAN WATER ACT ARE A SUPPLEMENTAL METHOD FOR ABATING ONGOING VIOLATIONS.

Congress placed primary responsibility for enforcement of the Clean Water Act with the Environmental Protection Agency and those states implementing the Act under authorized NPDES permit programs. Citizen suits serve purposes that are subordinate to primary enforcement by governmental agencies. They are meant to stimulate governmental activity and to provide an alternative, supplemental mechanism for forcing compliance if those government agencies do not act. *See Baughman* v. *Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). As stated by the Court of Appeals for the Seventh Circuit in construing the citizen suit provision of the Clean Air Act: [8]

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[8] The citizen suit provision of the Clean Water Act is based upon the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7406(a) (1982). *See infra* at 14-15.

> Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief.

City of Highland Park v. *Train*, 519 F.2d 681, 690-91 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976). Therefore, Section 505 circumscribes the availability of citizen suits so that such suits serve to achieve abatement of illegal discharges, either indirectly by spurring compliance or federal or state enforcement action, or directly by the citizen suit.

A. The Language Of Section 505(a) Circumscribes The Availability Of Citizen Suits.

The citizen suit provision of the Clean Water Act sets forth with particularity the circumstances in which an action may be maintained by a citizen against a discharger. Section 505(a) of the Act permits any citizen to commence a civil action on his own behalf against any person "who is *alleged to be in violation of* . . . an effluent standard or limitation." 33 U.S.C. § 1365(a) (emphasis added). Section 505(f) defines "effluent standard or limitation" to mean, *inter alia*, "an effluent limitation or other limitation under section 301 or 302 of this Act" or an NPDES permit *"which is in effect."* 33 U.S.C. §§ 1365(f)(2), (6) (emphasis added).

The requirements of Section 505(a) and (f)—that a citizen suit plaintiff allege the discharger to be "in violation" of a permit limitation "which is in effect"—define the limited function of citizen suits to abate ongoing pollution.[9] As the First Circuit observed in *Pawtuxent Cove*, the statute speaks not in terms of taint, but in terms of

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[9] *See also* Section 505(h) (state may sue discharger in another state using the citizen suit provision if violation "is occurring" in another state and "is causing" effects in first state). 33 U.S.C. § 1365(h).

activity. "The clear import of section 505(a) is that citizens are empowered to seek injunctive relief against a polluter that 'is in violation' of the Act, and that in connection with such an action the district court is authorized to award 'any appropriate' civil penalties." 807 F.2d at 1092.[10] As explained by the Fifth Circuit in *Hamker*, 756 F.2d at 396:

> [T]he ordinary meaning of the words of the [Clean Water Act], the statute's structure and its prior Supreme Court interpretation indicate that section [505] does not authorize citizen suits seeking either injunctive relief or the imposition of civil penalties where the defendant is not alleged to be in violation of an effluent standard, limitation or order. The section "authorizes only prospective relief" even though "civil penalties . . . may be ordered by the court."

(citation omitted).

B. The Authority Conferred On Citizens Under Section 505 Is Not Coextensive With The Authority Of The Government Under Section 309.

The government is empowered by various sections of Section 309 of the Act, 33 U.S.C. § 1319, to enforce the Act in several ways: by issuing compliance orders, seeking injunctive relief, or seeking civil or criminal penalties.[11] Section 505 only partially parallels the government's authority.

Under Sections 309(c) and (d), the federal government may seek to recover penalties for violations at any

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[10] The Fourth Circuit's contrary conclusion—that the statute is sufficiently ambiguous that it must be read to mean a citizen action will lie to impose penalties against anyone who has *ever* violated the Act—discounts the distinction, as discussed below, between the language used in Section 505 and that used in Sections 309(c) and (d).

[11] The Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. Code Cong. & Ad. News (101 Stat.) 7, adds to Section 309 a provision for administrative penalty assessments.

time. These sections impose criminal and civil penalties upon any person who "violates" permit limitations, without reference to whether or not the violations are ongoing.[12]

A separate provision, Section 309(a), authorizes the government to issue compliance orders or to seek injunctive relief against dischargers who are "in violation" of effluent limitations or permits. This authorizes the government to act directly to abate ongoing violations, and differs on its face from Sections 309(c) and (d) which authorize penalties regardless of whether they are for past or present violations.

It is the Section 309(a) abatement provision to which the citizen suit provision, Section 505, is a counterpart. Section 505, like Section 309(a), is not a penalty provision aimed at general deterrence; rather, it provides a mechanism for compelling compliance with permit limitations by a discharger who is "in violation."[13] The citizen suit provision does not parallel the government's Section 309(c) and (d) authority to obtain penalties from a discharger who "violates" a permit at any time. Rather, Section 505 provides for penalties only as ancillary relief in a citizen suit to abate ongoing violations, and even then, only where "appropriate."

The Fourth Circuit cited the similarity in language between Section 505 and Section 309 without analyzing the significant differences between these provisions. It

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[12] The penalties are severe—up to $25,000 per day of each violation. 33 U.S.C. §§ 1319(c), (d), as amended by the Water Quality Act of 1987.

[13] The Senate Report accompanying S. 2770 made clear that the standard for federal enforcement under Section 309(a) and citizen suits under Section 505(a) "are the same," both being actions for "abatement." S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) ("S. Rep."), *reprinted in* Senate Comm. On Environment And Public Works, 2 Legislative History Of The Federal Water Pollution Control Act Of 1972 (Comm. Print 1973) ("Leg. Hist."), at 1499.

thus incorrectly held that citizen and EPA enforcement powers are "co-extensive." *Gwaltney*, 791 F.2d at 310. In fact, the right of action conferred on citizens by Section 505 is only a secondary means for achieving compliance with the Clean Water Act. Actions under the citizen suit provision are limited by the terms of Section 505 to those actions that would secure the abatement of pollution.[14]

C. Penalties In Citizen Suits Are Ancillary To The Purpose Of Achieving Compliance.

The citizen suit provision of the Clean Water Act was modeled on the citizen suit section of the Clean Air Act, 42 U.S.C. § 7604, which focuses on "citizen suits against polluters *to abate violations*" of the Act.[15] The citizen suit provision of the Clean Air Act provides only for injunctive relief.

In enacting the Clean Water Act, Congress added to Section 505(a) the provision for the imposition of civil penalties in a citizen suit.[16] By adding this sanction, how-

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[14] Indeed, if a citizen suit results in abatement of a violation, the citizen plaintiffs may be entitled to costs and attorneys' fees even if a verdict is not reached in the suit. In discussing the authority of a court to award costs "whenever appropriate," the Senate Report on S. 2770 states that:

> This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

S. Rep. at 81; 2 Leg. Hist. at 1499.

[15] Summary of the Provisions of Conference Agreement on the Clean Air Act, *reprinted in* Senate Comm. On Public Works, 1 Legislative History Of The Clean Air Act Amendments Of 1970, 93d Cong., 2d Sess. (Comm. Print 1974), at 136 (emphasis added).

[16] The Senate Report explained:

> As in [the Clean Air Act] the provision in this bill is carefully restricted to actions where violations of standards and regula-

ever, Congress did not alter the thrust of the section, which is to abate ongoing pollution. The First Circuit notes:

> Alertness of concerned citizens . . . was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen action for injunction authorized under the Clean Air Act.

Pawtuxet Cove, 807 F.2d at 1092-93.

Determination of whether injunctive relief is warranted is left to the court, applying the traditional, well-defined standards which govern the availability of injunctive relief. The imposition of penalties in a citizen suit is permitted only in conjunction with injunctive relief, and then only where "appropriate." [17]

"Appropriate," given the limitations on citizen suits discussed above, must mean that civil penalties are permissible under Section 505 only when they would serve to abate or prevent ongoing violations. Where there is no likelihood of future violations by a particular discharger, the imposition of penalties for past violations would not be "appropriate" and, therefore, is precluded by the plain language of Section 505.[18] The word "ap-

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> tions or a failure on the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

S. Rep. at 792; 2 Leg. Hist. at 1497. *See also* H. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) ("H.R. Rep."); 1 Leg. Hist. at 820.

[17] The dictum in *Pawtuxet Cove* that "[a] plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable," 807 F.2d at 1094, is incorrect.

[18] Even in the case where injunctive relief is granted to abate ongoing violations, the court has discretion as to whether to assess

propriate" must be viewed as a constraint on the imposition of civil penalties in citizen suits, a constraint which does not appear in the provision authorizing civil penalties in suits brought by EPA under section 309.[19]

That citizen suits are authorized only to compel compliance is further indicated by the requirement of advance notice of a citizen suit to both the discharger and to the federal and state enforcement agencies.[20] 33 U.S.C. § 1365(b)(1)(A).

The alleged violator who receives notice is thus provided with an opportunity to bring its discharges into compliance. Should it do so, the purpose of the suit has been achieved, and the need for any litigation is obviated. Similarly, should the governmental entities receiving notice be prompted to initiate action to secure compliance,[21] the citizen suit is then precluded. The

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ancillary penalties and civil penalties may not serve any useful compliance purpose in a particular case.

[19] As noted above, Sections 309(c) and (d) impose criminal and civil penalties upon any person who "violates" the limitations of the Act, without reference to whether the discharger is currently "in violation" or whether penalties are "appropriate." The term "appropriate" in Section 505 cannot refer to the court's discretion to fix the amount of any penalty, because such discretion is inherent under either Section 309 or Section 505. As use of the term in Section 505 surely is not mere surplusage, it must refer to a constraint applicable to citizen suits but not government penalty actions.

[20] The court in *Hamker*, 756 F.2d at 396, explained:

> [T]he Act is structured to concentrate enforcement authority in the Administrator and the states, with supplementary power given to citizens under section [505(a)]. This supplementary power may be exercised only where neither the authorities nor the polluter acts to terminate the ongoing violation.

[21] The notice provision requires that the plaintiff give notice at least sixty days prior to the commencement of a civil action. The notice enhances the ability of the Administrator to "find[] that any person is in violation of any condition or limitation", a prerequi-

statute expressly precludes citizen action where the government is diligently prosecuting an action against a discharger "to require compliance with" the applicable requirement. 33 U.S.C. § 1365(b)(1)(B). As the House Report stated, no suit may be brought if "an abatement action is pending and is being diligently pursued in a United States or State Court." H.R. Rep. at 133; 1 Leg. Hist. at 820.

Each of these provisions evidences Congress' intent that a citizen suit be brought to secure present or prospective compliance with the requirements of the Act. This may be accomplished either through inducing voluntary compliance following receipt of a notice letter, spurring state or federal enforcement or, if necessary, by commencement of a separate citizen suit.

II. RECURRING VIOLATIONS ARE NECESSARY TO SUPPORT A CAUSE OF ACTION UNDER SECTION 505.

A. The Appropriate Test Is One That Looks To The Likelihood Of Continuing Violations.

In determining whether a citizen suit will lie under Section 505, the district court must look to whether the action is one for abatement, not just penalties. Under the statutory scheme and language discussed above, a citizen is not empowered to bring an action solely for the imposition of penalties relating to purely past violations; such an action is the prerogative of federal and state enforcement authorities in the exercise of their prosecutorial discretion. In citizen suits, the action must be brought against a discharger who is "in violation," "to enforce" the terms of the discharger's permit; penalties may be awarded as relief ancillary to an injunction, but only where appropriate, pursuant to Section 505(a).

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site to the issuance of an administrative compliance order or commencement of a civil action by the government to restrain that violation. 33 U.S.C. §§ 1319(a), (b).

As the action is one for abatement of pollution, the court must determine whether a defendant discharger is "in violation" by looking at whether there are ongoing violations susceptible of abatement. *Amici* submit that the First Circuit's construction in *Pawtuxet Cove* is particularly apt:

> We therefore think that the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violation justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one. We find this possible in the fact that the statutory phrase is not the three words we have heretofore considered, but is 'is alleged to be in violation.' It is far less of a stretch to interpret these words as applicable to a present continuing intent than to take the *Gwaltney* court's encompassing a single past act . . . If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction.

807 F.2d at 1093-94 (citation omitted).

Courts are well accustomed to engaging in this sort of "injunction analysis." The First Circuit had no difficulty articulating factors that would enter into the analysis:

> In reviewing action under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations.

804 F.2d at 1094 (citation omitted).

The Fifth Circuit employed a similar analysis in *Hamker* when it upheld dismissal of a citizen suit where there were no allegations of ongoing violations or facts that

would warrant prospective relief. 756 F.2d at 396. The Fifth Circuit's analysis is consistent with the approach adopted by the First Circuit. In each instance, the court looked to whether the citizen action was one for abatement of pollution; in each instance, the court found it was not.

Hamker involved a one-time rupture of a pipeline. *Pawtuxet Cove* involved a defendant who had ceased discharging. A more difficult case is posed by a discharger with intermittent violations, but the analysis is still the same. By focusing on whether the violations are likely to recur and thus susceptible of prospective relief, the "construction corresponds both with the statutory language and with the statutory purpose." *Pawtuxet Cove*, 807 F.2d at 1094. As Judge Williams concurring in *Hamker* noted, the statutory requirement that the discharge be "in violation" should be read "to cover the chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit." 756 F.2d at 399.

B. Alternative Formulations Do Not Effectuate The Statutory Purpose.

Other tests for what the statute means by "in violation" have been proffered by the parties and by the court in *Gwaltney*, but these tests do not correlate well with accomplishing the Congressional goal of abating violations and do not accommodate the uncertain and sometimes "trial and error" nature of water pollution regulation and control.

First, a test that focuses solely on whether the discharger is in violation on the precise day the citizen suit is filed may not achieve fully the statutory purpose of abating ongoing violations. For example, a plant might experience an excursion on the day of the complaint not due to any inadequacy of treatment, but solely due to the statistical variability discussed *supra* at 5, 8. Random

excursions can be expected, particularly where the permit contains limitations on a great many substances. Such an isolated "violation" would not warrant injunctive relief. Conversely, a plant might have woefully inadequate treatment capability, but might be in compliance on the day suit was filed. Both circumstances suggest that a test premised upon the serendipity of filing is inadequate. In short, the statute's requirement for ongoing violations must be given a practical construction to carry out the intent of the citizen suit provision.

Second, application of Section 505 to reach dischargers who have *ever* been in violation on *any* day, as argued by citizen plaintiffs, also fails to serve the statutory purpose of abating violations. The citizen suit provision is a supplemental mechanism for achieving compliance; it is not intended to supplant the government's authority to seek penalties for past violations.

Occasional, random excursions in excess of permit limitations are predictable and by definition unavoidable. *See supra* at 5, 8. It is ongoing violations, not random excursions, that are addressed by the citizen suit provision. While penalties in governmental enforcement actions *theoretically* are available for every instance of violation, including such random excursions, in practice regulatory authorities temper their enforcement activities in light of the vagaries of technology and the good faith remedial efforts of permittees.[22]

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[22] In fact, EPA *relies* on the availability of enforcement discretion when it sets effluent limitations guidelines. For instance, in the preamble to final discharge rules for the pulp and paper industry, EPA acknowledged that certain limits would result in "three to four violations of daily maximum limitations every year . . ." simply because of the statistical method employed by the Agency to select these limits. Preamble, *Pulp, Paper, and Paperboard Point Source Category Effluent Limitations Guidelines And New Source Performance Standards*, 45 Fed. Reg. 52,017 (1982). But EPA concluded that because it could exercise enforcement discretion, the rules would not "adversely affect industry or subject industry to

If citizen suits were allowed free of the statutory constraints discussed above, they would undercut reasonable progress toward the clean up goals of the Clean Water Act. Dischargers subject to penalties in citizen suits for any violation will be disinclined to accept stringent permit limitations without lengthy adjudication. Achievement of stringent effluent limits likely depends upon perfect operation of treatment technology at the limits of its capability. Such performance is never achieved in practice. Accordingly, permit applicants will seek less stringent permit conditions through administrative and judicial means, thus lengthening the permitting process, decreasing the likelihood that stringent operating conditions will finally be imposed, and directing resources away from achieving the goals of the Clean Water Act.

In addition, subjecting dischargers to citizen suits for absolutely any past violation, since remedied, is also likely to discourage the installation of new treatment technology, because such technology may result in occasional exceedence of permit conditions until the "bugs" can be worked out. Instead, dischargers will act conservatively and select conventional treatment technology which—although it may work more consistently than innovative designs—will not advance the state-of-the-art of water pollution control.

C. The Allegation Of Ongoing Violations In A Citizen Suit Must Be Factually Supported To Establish Jurisdiction And The Plaintiff's Right To Relief.

In the court below, the United States argued (as *amicus curiae*) that a good faith allegation of ongoing violations is sufficient to confer jurisdiction, and subse-

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the real possibility of unnecessary enforcement action." *Id.* The Agency stated: "Although the Clean Water Act is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. We have exercised and intend to exercise that discretion in a manner that recognizes and promotes good faith compliance efforts." *Id.*

quent proof of compliance should not divest the court of jurisdiction or result in dismissal.[23] The government's position is incorrect as a matter of law and would render the statutory provisions a nullity.

The requirement that a citizen suit be addressed to abatement of ongoing violations is both jurisdictional and substantive. When a discharger is in violation, *i.e.*, the facts show that violations are likely to recur unless enjoined, then Section 505 confers both jurisdiction on the court and a cause of action on the citizen to enforce the permit. Where such a case cannot be made, then the claim is subject to dismissal on jurisdictional grounds or on the merits.

Section 505 refers to the discharger being "alleged to be in violation." However, the word "alleged" should not be read to mean that jurisdiction or a claim is created by an unsupported allegation. Rather, allegations that violations are ongoing or likely to recur are subject to review for both facial and factual adequacy.

Subject matter jurisdiction may be challenged at any time, at the court's instance or pursuant to a Rule 12(b)(1) motion. Such a motion may attack the sufficiency of the complaint on its face, *e.g.*, when it does not even allege ongoing violations or the likelihood of recurrence. A motion under Fed. R. Civ. P. 12(b)(1) may also challenge the factual basis of subject matter jurisdiction, quite apart from the pleadings.[24] *See generally*

[23] Brief for the United States as *Amicus Curiae* Supporting Appellees at 21. The government argued that the "good faith" was demonstrated by the factual record, although it did not acknowledge that the sufficiency of the allegations is subject to factual challenge.

[24] In the court below, the United States contended that the reasonableness of the allegations was "subject to a number of safeguards (such as Rule 11 and attorneys' fees) to assure that they are not frivolous." Brief for the United States as *Amicus Curiae*, *supra* at 22. As discussed above, however, such "safeguards" have never supplanted a court's inquiry into the factual premises supporting subject matter jurisdiction.

Land v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). The Court there noted that while a motion for failure to state a cause of action assumes the allegations of the complaint to be true, when an issue of jurisdiction is raised, "the court may inquire, by affidavits or otherwise, into facts as they exist." As no procedure is specified, the mode of determining jurisdiction is left to the trial court. The Third Circuit has elaborated:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Mortensen v. *First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (footnote omitted). *See also Western Transportation Co.* v. *Coozens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982):

> We note that the district court may review any evidence submitted on the issue to determine if subject matter jurisdiction in fact exists. Moreover, the party alleging jurisdiction must support its allegation with competent proof of jurisdictional facts . . . The district court is not precluded from considering conflicting evidence which weighs on the jurisdictional determination.

The First Circuit in *Pawtuxet Cove* held that a citizen suit "may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." 807 F.2d at 1094.

The Court of Appeals likened this requirement to the amount in controversy for jurisdictional purposes, *i.e.*, a "reasonably held allegation" is sufficient to establish jurisdiction, and jurisdiction is not lost if subsequent inquiry reveals the allegation to have been incorrect. 807 F.2d at 1093.

The analogy to amount in controversy is a good one up to a point. Section 505 refers not to the actual existence of ongoing violations but to the allegation of them as being sufficient to confer jurisdiction. However, the jurisdiction allegations are not mere pleading requirements but must withstand facial and factual challenge. Even with respect to amount in controversy, the reasonableness of the allegation is subject to factual as well as facial challenge.[25]

Moreover, the analogy to amount in controversy is not complete because the requirement of ongoing violations is not only jurisdictional, it is also substantive. As discussed above, the requirement is an element of the plain-

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[25] As explained by this Court in *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938):

> [I]f, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, *or if, from the proofs*, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.

(emphasis added). *See also James* v. *Lusby*, 499 F.2d 488, 492-93 (D.C. Cir. 1974); *Giancana* v. *Johnson*, 335 F.2d 366, 368 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); *Lichter* v. *Paine, Webber, Jackson & Curtis, Inc.*, 570 F. Supp. 533, 535-36 (N.D. Ill. 1983); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607, 610-11 (S.D.N.Y. 1977); *Nixon* v. *Hampton*, 400 F. Supp. 881, 886-87 (E.D. Pa. 1975), *aff'd*, 535 F.2d 1247 (3d Cir. 1976); *Senate Select Comm. on Pres. Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 59-60 (D.D.C. 1973).

tiff's cause of action. If the allegations or undisputed facts (or facts established at trial) demonstrate that there was no ongoing violation or reasonable likelihood of recurring violations at the time the suit was filed, then the case should be dismissed on the merits. Dismissal would be appropriate in these circumstances because such a suit is not one for the abatement of pollution, and thus there is no valid cause of action.[26]

As the statutory language and purpose indicate, citizen plaintiffs have a cause of action only to compel compliance and abate illegal discharges. If there is no reasonable possibility of ongoing violations to be abated, then there is no basis for injunctive relief or for the imposition of penalties as an ancillary remedy to affirmative relief to ensure future compliance.

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[26] The issues of jurisdiction and the plaintiff's cause of action should be distinguished from the granting of relief. In addressing either jurisdiction or whether the plaintiff has stated a claim, the court would look to the likelihood of recurring violations as of the time of the complaint. The court could consider post-filing events to the extent they bear on the existence of a continuing or recurring violation when the suit was commenced. The availability of injunctive relief, however, along with ancillary or "appropriate" civil penalties, would always be based upon all facts available to a court at the time an injunction is entered.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to reverse the decision below, and to hold that the Clean Water Act authorizes citizen suits only to abate ongoing violations.

Respectfully submitted,

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